Supreme Court, U.S.
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No. 97-1418

In The

Supreme Court of the United States

October Term, 1998

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,
SUCCESSOR BY MERGER TO
BANK OF AMERICA ILLINOIS,

Petitioner,

v.

203 NORTH LASALLE STREET PARTNERSHIP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent, 203 North LaSalle Street Partnership, submits this Supplemental Brief in order to bring to the Court's attention late authorities and other intervening matter that was not available in time to be included in Respondent's Brief on the merits, pursuant to Rule 25(5) of the Supreme Court Rules.

I. Late Authority Supporting Respondent.

A. Fifth Circuit Authority.

Respondent filed its Brief on the merits on August 17, 1998. Thereafter, Respondent learned of *Matter of Cajun Electric Power Co-op, Inc.*, 150 F.3d 503 (5th Cir. 1998).[1] This decision supports Respondent's argument, contained at pages 12-14 of the Brief for Respondent, that "on account of" in 11 U.S.C. § 1129(b)(2)(B)(ii) means "in satisfaction of". In that case, the Fifth Circuit held that a plan proponent's payment to reimburse the legal fees of certain entities who were both creditors and equity interest holders in the debtor did not violate Section 1129(b)(2)(B)(ii). Specifically, the Court held that such payments were not made "on account of [the CCM members'] [unsecured] claim[s] or [their equity] interest[s]" because the payments were not made "in satisfaction of" those claims or interests. *Id.* at 518-519.

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[1] While the opinion is dated August 11, 1998, it was subsequently revised on August 26, 1998 and did not come to counsel's attention until after August 17, 1998. The opinion is reported in the paper volume of West's Federal Reporter, Third Series, dated September 14, 1998.

B. Other Authority

For a comprehensive analysis of the issues of this case, Respondent respectfully directs the Court's attention to Randolph J. Haines, *The Unwarranted Attack On New Value*, 72 Am. Bankr. L.J., at pages 301-368 (1998) (To be published by October 31, 1998).

II. Misstatement of Legislative History in the Reply Brief.

This Supplemental Brief was not written to answer arguments in the Reply Brief for the Petitioner. The Bank's misstatement of the text and legislative history of Section 1129(b) in the Reply Brief creates such a severe misimpression that we are obligated to correct it.

At page 13 of the Reply Brief, Petitioner quotes from a House Report on an early version of Section 1129(b) which was never enacted.[2] That version, reported to the full House on September 8, 1977 (the "1977 Bill"), was materially different from Section 1129(b) as finally

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[2] The Reply Brief states:

> In Section 1129(b)(2), Congress adopted a detailed definition of "fair and equitable" that did not exist in pre-1978 bankruptcy law. Moreover, in doing so, the House Report explained that "[t]he elements of the test *are new*[,] *departing from both the absolute priority rule* and the best interests of creditors tests found under the Bankruptcy Act." H.R. Rep. No. 95-595, at 414 (emphasis added). . . . When the statutory text is considered in conjunction with the House Report, the conclusion that Congress intended to depart from pre-Code law here is inescapable.

enacted (the "Code Section").[3] Specifically, the text of Section 1129(b), as it was proposed in the 1977 Bill, does not contain the words "fair and equitable" – the Code Section does. Nor does the 1977 Bill, as contrasted with the Code Section, use the word "includes," to introduce the various subparagraphs setting forth the minimum standards for confirming a plan over the dissent of various classes of creditors and interest holders.[4]

Congress treated the floor statements of Representative Edwards and Senator DeConcini regarding the Code Section as having the effect of a conference report. 124 Cong. Rec. 32,376 (Oct. 5, 1978). See *Begier v. IRS*, 496 U.S. 53, 64 n.5 (1990). Unlike the House Report quoted in the Reply Brief, these floor statements conspicuously do not say that Section 1129(b) "depart[s] from both the absolute priority and the best interests of creditors tests" – the language quoted (with emphasis added) by Petitioner from H.R. 95-595 (the report on the 1977 Bill). With respect to the text of the Code Section, Representative Edwards stated:

> Paragraph (1) makes clear that this alternative confirmation standard, referred to as 'cramdown,' will be called into play only on the request of the proponent of the plan. Under this cramdown test, the court must confirm the plan if the plan does not discriminate unfairly, and is 'fair and equitable,' with respect to each class of

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[3] The text of the 1977 Bill is attached as Supplemental Appendix.

[4] "Includes" is specifically defined by 11 U.S.C. § 102(3) as "not limiting."

> claims or interests that is impaired under, and has not accepted, the plan. . . .
>
> Although many of the factors interpreting 'fair and equitable' are specified in paragraph (2), others, *which were explicated in the description of section 1129(b) in the House report* [the report quoted by Petitioner] *were omitted from the House amendment* to avoid statutory complexity and because they would undoubtedly be found by a court to be fundamental to 'fair and equitable' treatment of a dissenting class.

(emphasis added). 124 Cong. Rec. 34,006 (October. 5, 1978) (statement of Rep. Edwards). Thus, contrary to Petitioner's representation, Congress did not adopt "a detailed definition of 'fair and equitable'."

By failing to mention that both the statutory text and the legislative history referred to at page 13 of Petitioner's Reply Brief differ in significant and material ways from both the Code Section and its legislative history, Petitioner creates a serious misimpression regarding the meaning of the Code Section and Congress' intent to carry forward into the Code through the "fair and equitable" requirement the new value principles which the Court long ago recognized as being part of that term of art.

Respectfully submitted,

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Union Calendar No. 311

95TH CONGRESS
1st SESSON

H. R. 8200

[Report No. 95-595]

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1977

Mr. EDWARDS of California (for himself, Mr. BUTLER, Mr. SEIBERLING, Mr. DRINAN, Mr. VOLKMER, Mr. BEILENSON, and Mr. MCCLORY) introduced the following bill; which was referred to the Committee on the Judiciary

SEPTEMBER 8, 1977

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

(Strike out all after the enacting clause and insert the part printed in italic)

A BILL

To establish a uniform Law on the subject of Bankruptcies.

* * *

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this chapter.

(2) The proponent of the plan complies with the applicable provisions of this chapter.

(3) The proponent of the plan has proposed the plan in good faith, and not by any means forbidden by law.

(4)(A) Any payment made or promised by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, has been disclosed to the court; and

(B)(i) any such payment made before confirmation of the plan is reasonable; or

(ii) if such payment is to be fixed after confirmation of the plan, such payment is subject to the approval of the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy.

(B) The proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation of such insider.

(6) Any regulatory commission with jurisdiction, after confirmation of the plan, over the rules of

the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each class, each holder of a claim or interest of such class –

(A) has accepted the plan; or

(B) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

(8) With respect to each class –

(A) such class has accepted the plan; or

(B) the claims or interests of such class are unimpaired under the plan.

(9) The plan provides that each holder of a claim of a kind specified in section 507 of this title will receive on account of such claim, property, other than a security of the debtor, an affiliate participating in a joint plan with the debtor, or a successor to the debtor under the plan, of a value, as of the effective date of the plan, equal to the allowed amount of such claim, except to the extent that the holder of a particular claim of such kind has agreed to a different settlement of such claim.

(10) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b) Notwithstanding section 510(a)(1) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of such plan, shall confirm such plan notwithstanding the requirements of such paragraph if –

(1) with respect to each class of secured claims –

(A) each holder of a claim of such class will not receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, greater than the allowed amount of such claim; and

(B)(i) such class has accepted the plan;

(ii) the claims of such class are unimpaired; or

(iii) each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value as of the effective date of the plan, equal to the allowed amount of such claim, unless such holder has agreed to a different treatment of such claim;

(2) with respect to each class of unsecured claims –

(A) each holder of a claim of such class will not receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, greater than the allowed amount of such claim; and

(B)(i) such class has accepted the plan;

(ii) the claims of such class are unimpaired;

(iii) each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of

the plan, equal to the allowed amount of such claim, unless such holder has agreed to a different treatment of such claim; or

(iv) the plan does not discriminate unfairly against such class, and the holders of claims or interests of any class of claims or interests, as the case may be, that is junior to such class will not receive or retain under the plan on account of such junior claims or interests any property; and

(3) with respect to each class of equity securities –

(A) if, under the terms of such equity securities, the holders of the interests of such class are entitled to a fixed liquidation preference, or the debtor may redeem such equity securities at a fixed price, then each such holder will not receive or retain under the plan on account of such interest property of a value, as of the effective date of the plan, greater than the greater of –

(i) the amount of any such liquidation preference; and

(ii) the amount of any such fixed price; and

(B)(i) such class has accepted the plan;

(ii) the interests of such class are unimpaired;

(iii) if, under the terms of such equity securities, the holders of such interests are entitled to a fixed liquidation preference, or the debtor may redeem such equity securities at a fixed price, then each such holder will receive or retain under the plan on account of such interest property of a value, as of the effective date of the plan, equal to the greater of the amount of

any such liquidation preference and the amount of any such fixed price;

(iv) the holders of any interests that are junior to the interests of such class will not receive or retain under the plan on account of such junior interests any property; or

(v) there are not any interests junior to the interests of such class.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 11.27(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

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